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Attorneys for Montana Farm Bureau Federation

**BEFORE THE COMMISSIONER OF SECURITIES AND INSURANCE,  
MONTANA STATE AUDITOR  
STATE OF MONTANA**

**IN THE MATTER OF**

**MONTANA FARM BUREAU  
FEDERATION,**

**Respondent.**

**Case No.: INS-2011-24**

**BRIEF IN SUPPORT OF MOTION  
FOR PARTIAL SUMMARY  
JUDGMENT**

**Introduction**

The Commissioner of Securities and Insurance ("CSI") is attempting to hold Montana Farm Bureau Federation ("MFBF") responsible for the alleged misdeeds of insurance professionals. But contrary to the position of CSI, the UTPA does not apply to those who are not engaged in the business of insurance; it applies to insurance professionals like New West Health Insurance ("New West"). It was New West who drafted the alleged offending statements in this matter, and MFBF is not engaged in the business of insurance. Accordingly, all UTPA claims filed by CSI should be dismissed.

### **Undisputed Material Facts**

MFBF is a non-profit entity advocating for Montana's farmers and ranchers. It was formed in 1919 for the purpose of making the business of farming and ranching more profitable, and the community a better place to live. (Affidavit of Jake Cummins at ¶ 2, attached as Exhibit A.) MFBF's purpose is as follows:

MFBF is an independent, non-governmental, voluntary organization with its roots in agriculture. Farm Bureau provides an organization where members may secure the benefits of united efforts in a way that could never be accomplished through individual effort. MFBF is the state's largest agriculture organization and advocate for Montana agriculture.

MFBF is local, county, state, national and international in its scope and influence and is non-partisan, non-sectarian and non-secret in character. Farm Bureau is the voice of agriculture producers.

In short "We Care For the Country."

(See <http://mfbf.org/about/>, accessed January 5, 2013.)

MFBF does not conduct insurance business. It has no insurance licenses. (Cummins Aff. at ¶ 3.) In 1946, the company that would become Mountain West Farm Bureau Insurance ("Farm Bureau Insurance") was formed in Wyoming by the Wyoming Farm Bureau Federation. (*Id.* at ¶ 4.) Since 1958, Farm Bureau Insurance has existed as a mutual insurer for the members of MFBF. (*Id.* at ¶ 5.) Farm Bureau Insurance is completely independent of MFBF. Farm Bureau Insurance and its agents – not MFBF – sell all "Farm Bureau" branded casualty insurance. (*Id.* at ¶ 6.)

MFBF does, from time to time, provide its members with information about insurance from insurers other than Farm Bureau Insurance. (*Id.* at ¶ 7.) As part of its services to its members, it works with insurers to convince them, the insurers, to provide affordable, effective insurance products. (*Id.* at ¶ 8.) It provides information about these products as a member service. (*Id.* at ¶ 9.) It sends mailings crafted by the

insurers to its members from time to time to assist in the administration of those plans while protecting the individual privacy of its members. (*Id.* at ¶ 10.)

### **Argument**

#### **I. The Unfair Trade Practices Act does not apply to MFBBF.**

CSI alleges that MFBBF has violated the UTPA by distributing allegedly false statements made about the plan by New West and Payne Financial Group, the agent hired by New West to sell the product (“Payne Financial”). Its allegations must fail because the UTPA “only cover[s] those in the business of insurance.” *Martel v. Montana Power Co.* (1988), 231 Mont. 96, 108, 752 P.2d 140, 147. The Supreme Court expounded on the UTPA’s limited scope in *Ogden v. Montana Power Co.* (1987), 229 Mont 387, 747 P.2d 201.

The legislature enacted the Montana Insurance Code, Title 33, MCA, to govern and regulate the business of insurance. The Unfair Trade Practices act, Section 33-18-101 et seq., MCA, as [sic] a part of the Montana Insurance Code and by virtue of its own stated purpose was enacted to govern and regulated trade practices in the business of insurance.

*Id.* at 229 Mont 204, 747 P.2d at 392. The Court continued to note that the UTPA’s stated purpose is to “regulate trade practices in the business of insurance in accordance with the intent of congress as expressed in P.L. 79-15.” *Id.* at 229 Mont. 204, 747 P.2d at 393 (citing § 33-18-301, MCA). Based on the reasoning, the Court held that Montana Power was not subject to the UTPA because its business is not insurance, it is the production and distribution of electrical power. *Id.*

Thus, a party is only subject to sanction under the UTPA if it is actively engaged in the “business of insurance.” The Montana Supreme Court has defined that term very narrowly in accordance with federal interpretation of Public Law 79-15. “[I]nsurance is that business where a large number of risks are accepted, some of which involve losses,

and the spreading of such risks which enables the insurer to accept each risk at a slight fraction of the possible liability upon it.” *K-W Industries, A Division of Associated Technologies, LTD. v. National Surety Corporation* (1988), 231 Mont. 461, 465, 754 P.2d 502, 504 (citing *Group Life and Health Insurance v. Royal Drug Company*, 440 U.S. 205 (1979)).

The Supreme Court has held to this definition. In *Ogden* as well as *Martel v. Montana Power Company*, 231 Mont. 96, 752 P.2d 140, it held that Montana Power could not be held liable under the UTPA even though it was self insured, because it did not accept a “large number of risks.” The Court in *Ogden* explained that such an entity should not be subject to “all the technical Montana insurance industry regulations” since they were not a member of that industry. 229 Mont. at 393, 747 P.2d at 205. The only instances in which the Supreme Court has found that the UTPA does apply involve entities obviously involved in the mass shifting of risk such as sureties or licensed insurance agents. See *K.W. Industries, supra*; *Kaseta v. Northwestern Agency of Great Falls* (1992) 252 Mont. 135, 827 P.2d 804 (insurance agents subject to the Act).

The UTPA claim against MFBB must be dismissed because MFBB does not engage in the business of insurance. It is not an insurer. It does not sell insurance, and it does not negotiate insurance. (Cummins Aff. ¶ 15.) MFBB is in the business of advocating for Montana’s farmers and ranchers. It licenses use of its logos for insurance benefits for its members, but that tangential connection to the industry does not constitute the intimate involvement in the sharing of risk that the Supreme Court has required to subject an entity to the technical requirements of the insurance code. (*Id.* at ¶ 16.) Therefore, the UTPA count must be dismissed.

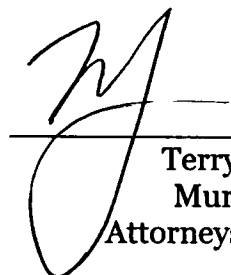
In this case, the logic of the rules discussed above prevents a manifest injustice. CSI takes issue with the representation that MFBF's members could spread the risk of loss by joining together in this plan. (*See generally* Notice.) That representation was not made by MFBF, it was made by New West. Greg Loughlin of New West drafted the language for use in New West's marketing materials. (Email from Loughlin, Bates No. 00296, attached hereto as Exhibit B.) In the interest of protecting its membership's privacy, MFBF agreed to send the mailing for New West. (Cummins Aff. ¶ 17.) It had no more to do with the allegedly offending language reaching consumers than the U.S. Postal Service. In such instances, the ultimate responsibility for the content should be placed on the party with the most knowledge of the insurance product and insurance regulations – New West. In this case, New West has already settled with CSI and paid a fine for its alleged misrepresentations. It would be unfair to punish MFBF for New West's acts, and doing so would not further the mission of CSI.

### **Conclusion**

Based on the foregoing, summary judgment dismissing CSI's UTPA claims against MFBF should be granted.

DATED this 16 day of January, 2013.

Gough, Shanahan, Johnson & Waterman, PLLP



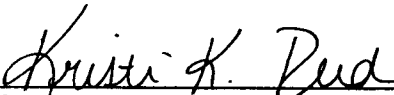
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Terry B. Cosgrove  
Murry Warhank  
Attorneys for Respondent

### **CERTIFICATE OF SERVICE**

I hereby certify that on the 16<sup>th</sup> day of January, 2013, a true and correct copy of the foregoing *Brief in Support of Motion for Partial Summary Judgment* was this day deposited in the United States mail, postage prepaid, addressed to:

Brett O'Neil  
Office of the Commissioner of Securities and Insurance  
Montana State Auditor  
Legal Services Office  
840 Helena Avenue  
Helena, MT 59601

  
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STATE OF MONTANA**

	)	
	)	
<b>IN THE MATTER OF</b>	)	<b>Case No.: INS-2011-24</b>
	)	
	)	<b>AFFIDAVIT OF JAKE</b>
<b>MONTANA FARM BUREAU</b>	)	<b>CUMMINS</b>
<b>FEDERATION,</b>	)	
	)	
<b>Respondent.</b>	)	
	)	

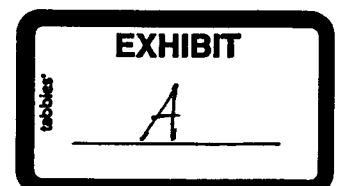
STATE OF MONTANA)

:SS  
County of Gallatin )

**JAKE CUMMINS, being first duly sworn, says:**

1. I am a representative of Montana Farm Bureau Federation (MFBF), the respondent in the above-entitled action. I have attained the age of majority, am competent to testify on the matters herein, and the testimony I provide is based on my personal knowledge.

2. MFBF is a non-profit entity involved in the work of advocating for Montana's farmers and ranchers. It was formed in 1919 for the purpose of



making the business of farming and ranching more profitable, and the community a better place to live.

3. MFBF does not conduct insurance business. It has no insurance licenses.

4. In 1946, the company that would become Mountain West Farm Bureau Insurance ("Farm Bureau Insurance") was formed in Wyoming by the Wyoming Farm Bureau Federation.

5. Since 1958, Farm Bureau Insurance has existed as a mutual insurer of members of MFBF.

6. Farm Bureau Insurance is completely independent of MFBF. Farm Bureau Insurance and its agents sell all "Farm Bureau" branded casualty insurance.

7. MFBF does, from time to time, provide its members with information from insurers about their products.

8. As part of its member services, it works with insurers to provide affordable, effective insurance products.

9. It provides information about these products as a member service.

10. It sends mailings crafted by the insurers to its members from time to time protecting the individual privacy of its members.

11. MFBF and New West entered into a Royalty Agreement in 2010 under which New West was allowed to sell a health insurance policy branded with MFBF's trade name and trademarks.



12. New West agreed to provide insurance to MFBF members that would be cheaper or provide more coverage to MFBF members than other association health plans that it wrote.

13. New West Vice President of Strategic Growth Greg Loughlin drafted selling points about the insurance that were used on New West's website and in a pamphlet drafted by New West. He described his company's insurance product as spreading the risk of premium adjustments among the MFBF membership. Indeed, Loughlin indicated to MFBF that the group and individual plans labeled with MFBF logos would be adjusted yearly to provide the membership with the benefit of what he believed was the lower risk that they presented to New West.

14. Contrary to CSI's assertions, MFBF never made such a claim, though it sent New West's pamphlets to its members directly to protect their privacy.

15. MFBF does not engage in the business of insurance. It is not an insurer. It does not sell insurance, and it does not negotiate insurance.

16. MFBF is in the business of advocating for Montana's farmers and ranchers. It licenses use of its logos for insurance benefits for its members, but that tangential connection to the industry does not constitute the intimate involvement in the sharing of risk that the Supreme Court has required to subject an entity to the technical requirements of the insurance code.

17. In the interest of protecting its membership's privacy, MFBF agreed to send the mailing for New West.

18. It is undisputed that MFBF did not ask any of its members to apply for this insurance.

19. It never sold a policy, and it never negotiated with anyone for the sale or purchase of a policy.

20. MFBF was attempting to furnish information related to the insurance plan to its members.

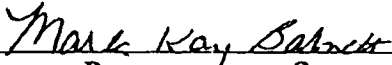
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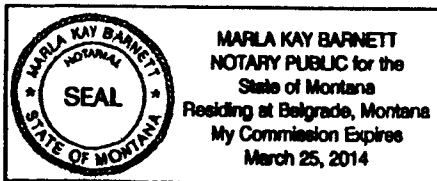
Dated this 7<sup>th</sup> day of January, 2013.

  
Jake Cummins

SUBSCRIBED AND SWORN TO, before me this 7<sup>th</sup> day of January, 2013.

(Notarial Seal)

  
NOTARY PUBLIC FOR THE STATE OF MONTANA  
Printed Name: Marla Kay Barnett  
Residing at: Belgrade, Montana  
My Commission Expires: March 25, 2014



## Greg Loughlin

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**From:** Greg Loughlin  
**Sent:** Wednesday, January 20, 2010 10:02 AM  
**To:** Scott Kulbeck  
**Cc:** Theresa Fairbanks (tfairbanks@pfgworld.com); Tory Pescosolido (tpescosolido@nwHP.com); Rajeev Pillai  
**Subject:** Website and  
**Attachments:** Farm Bureau Benefits Flyer.doc

Scott,

Finally slowing down enough after the hectic first of the year to focus on some things we need to do. I reviewed the website and have a suggestion. I think the strategy that has proven effective for us is really to provide less info online for group coverage and get a prospect to an agent as fast as possible. Group health is very, very confusing – unfortunately, so the faster we get a prospect to an agent the better for all concerned.

Toward that end, it may be better to provide much less information online and only tease them to making that all important call. Once they do that, we can log them in our system and get them to Payne. I have pasted sample info that I would replace the info on <http://www.mfbf.org/page/group/health> with below. Also, I am attaching a new Benefits At A Glance flyer for the web (*I have also printed out some for your booth today*).

I am also beginning to work on New West's Farm Bureau website.

Thanks,  
Greg

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## Montana Farm Bureau Federation Association Group Health Plan

### About our association plan:

Thank you for your interest in the Montana Farm Bureau Health Plan for your Employees. New West Health Services, our Association plan administrator is a company you can trust. New West is the 2<sup>nd</sup> largest health plan in Montana. It is a Montana-based, hospital sponsored health plan serving over 40,000 Montanans. By joining together, Montana Farm Bureau Federation members spread the risk of catastrophic health expenses among our large membership.

We believe our membership, by the nature of our work, is more likely to be active and healthy than the general population. If this is the case, by joining together we are pooling ourselves into a group in which health expenses should be less than average – resulting, over time, in premiums that are lower than average.

Core to this strategy is not just encouraging a healthy lifestyle for our members but also encouraging association plan members to make sensible decisions about receiving smart, preventive medical services. Staying healthy is as important as living healthy.

We don't just talk about believing in prevention - *we prove it with our health plan benefits.*

### All plans include:

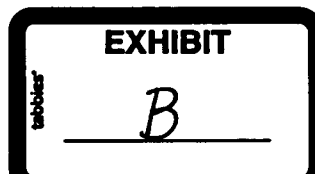
\$10 Annual Eye Exam • 100% coverage for breast cancer screening • 100% coverage for colorectal cancer screening

### In addition:

Coverage is also provided in all plan options for other preventive services such as routine immunizations, cervical cancer screening, cholesterol & lipid disorder screening, preventive medical testing, and prostate cancer screening.

### You qualify for the association plan:

If you are a member in good standing with the Montana Farm Bureau Federation and you have between 2 and 50 employees.



Click here to view our [Benefits at a Glance](#)

**Not a member of an employer group?** As a Farm Bureau member you qualify to receive a special premium holiday when first enrolling in a New West individual plan! After 11 months of continual coverage the 12<sup>th</sup> month premium is waived! (*New members only*)

**Would you like to find out more?** Call our help line at (888)-873-8046

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